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THE RECALL OF JUDICIAL DECISIONS.

The subject of the recall of judicial decisions will be considered not from a political but from a legal standpoint.

Broadly speaking, the recall of judicial decisions is as old as the statute law. When we examine the British statutes from their earliest date down to the present time, we find innumerable acts that have been passed solely to destroy or recall the effect of the decisions of the courts of that country. Examine the reports of decisions of any of the states of the Union, examine the reports of decisions of the Supreme Court of the United States, and you will find thousands of these decisions destroyed by subsequent statutory enactments. You will find in almost every state, reported cases that are worn out or shorn of their effect by common consent, without any statute or written declaration destroying them. Take for instance the feudal tenures that existed under the common law, take the tenancy in socage that existed in a great many parts of the country, take the doctrine of escheat as an incident of tenure; in many of the states you will find this doctrine and those tenures destroyed without any legislative act, and without any written declaration by the people expressing their disapproval. By common consent, these statutes and the decisions of the Courts upholding them have fallen into innocuous desuetude, and are no longer looked upon as law.

In the case of Matthews *v.* Ward, 10 Gill & John. (Md.), p. 403, the Supreme Court of the State of Maryland held that the English doctrine of tenures was destroyed by the Revolution, and that the right of escheat no longer inured to the benefit of a private individual, the lord of the fee, but that it inured to the sovereign, and to the sovereign alone, and that while land in the state was formerly held by a socage tenure, it now was allodial.

Thus the people by common consent struck down the feudal

conditions, and adopted conditions more conducive to the existence of society as it was after our Revolution.

Go back into the early history of England and see the statutes that have been passed again and again to abrogate the decisions of courts. The Magna Charta recalled certain of the privileges of the lords and made the people of England freer and less subject to feudal burdens. That whole system of English law which can be treated under the head of "Mortmain statutes" contains a history of the recall of the decisions of the courts. As fast as the Chancery courts would hold that property could be acquired by ecclesiastical corporations by a new mode of transfer not prohibited by law, the Parliament would recall the decision and prohibit the acquiring of property in this new manner; and when after this another way would be invented, which circumvented the last statute and permitted the conveyance of the lands, another statute would be shaped to meet it. So it continued, until we have a long line of enactments down to the Statute 23 Henry VIII, that again and again recalled the decision of the Chancellor and attempted to prevent alienation in mortmain.

These statutes well illustrate the doctrine of recall used in its broader sense, and if you turn to the statute law of any state in the Union, you will find, again and again, instances of the recall of judicial decisions. Without enumerating them let the reader of this article take up any number of one of the volumes of any of the state reports, and he will find cases that are no longer law, by reason of the fact that the legislature has passed a statute relieving the people from the decision of the court. In fact a great deal, if not all of the remedial legislation of the several states of the Union is passed for the purpose of abrogating or altering some doctrine held to by the courts. The harsh rule of contributory negligence as defined again and again by the courts is in certain circumstances relieved against by the Federal statute known as the "Employers' Liability Act." The doctrine of "fellow servant" and the rule of "assumed risk" or "a release being an absolute defense to a cause of action" has under certain circumstances and as to the certain persons been destroyed by this act; and all that great volume of law that refers to the liability of the master as against the servant is,

in the cases enumerated in this act, recalled and destroyed. This act establishes for the future a new liability, and all of the authorities pertaining to the doctrine of fellow servant, the doctrine of contributory negligence, the rule of assumed risk, and the rule as to the release being a defence to the cause of action, are destroyed, and as to the persons named in the statute these authorities are no longer law. They have been recalled by the Congress of the United States.

If you examine the reports of the several states on questions of procedure, on the right of appeal, you will find many of the decisions nullified by subsequent statutes—statutes passed to relieve against hardships that had resulted from the construction placed upon them by the courts.

I remember a case in the State of Maryland where between the verdict and the judgment the defeated plaintiff died. After the administrator had been appointed, he was made party plaintiff. The judgment was entered on the verdict against him, and the case carried up to the Court of Appeals of that State. A motion was made to dismiss the appeal on the ground that although statutes had been passed in that State permitting appeals in the case of death of the party desiring to appeal, still those statutes gave no right to appeal where the death occurred between verdict and judgment. On the hearing of this motion, the court, construing these statutes, sustained the contention and dismissed the case. Within a few days thereafter, the Maryland Legislature, being then in session, passed a law annulling this decision and permitting an appeal although the person desiring to appeal died between verdict and judgment. If counsel had been more alert, they could have had the law include their case, and had the court hear their appeal on its merits.

It might be suggested that we are not here dealing with the recall of judicial decisions within the meaning attempted to be given it at the present time or within its political meaning; and, therefore, instead of considering the recall of judicial decisions in its broader sense, I will now take up and consider it as applied to past decisions, and will attempt to show from a legal standpoint that it has been in existence for a great many years. It must be remembered that under the English common law system there came a time when the legislative and the judicial

system became one, and the highest court in England was and is today made up of a legislative body, as in a great many of the states the Senate was for a number of years the highest court. So in England for a long number of years, the House of Lords has been the highest judicial tribunal. It was customary, however, in considering judicial questions in the House of Lords for the judges and lawyers of the body to sit in judgment on appeals, and the laymen had little, if anything to do with any of the cases brought there for decision. This was contrary to the systems that existed in this country, where the Senate was considered as the highest judicial tribunal, and an examination of the decisions in the several states where the Senate so acted shows that all of the senators participated in the hearings on appeal.

While English history shows that the Commoners often resented the encroachment of the courts upon their rights, there is at least one instance of the House of Lords interferring with affairs and administering a rebuke to the courts. As I read the reports, the great case of Reeve *v.* Long, 1 Salk., 227, was reversed by the House of Lords against the opinion of all the judges of that body and against the opinion of the judges of the Court of Common Pleas and Court of Kings Bench, and in order to make certain that reversal, there was passed the Statute of 10 and 11 William III, Chap. 16, extending that decision to deeds and settlements as well as to wills.

Coming to our own country, we find acts of the state legislature settling titles where the decisions of a court cannot settle them, and we find the courts holding these statutes valid and constitutional. It is just as well as a settled principle of our common law as it was of the common law of England, that there can be grants by acts of the legislature, and in making these, the legislature is not confined to property belonging to the State, but can, if it so desire, make grants of private property; and this has often been done in order to nullify the decisions of courts. It is not a taking of private property of one person and giving it to another, but the transfer of land by the authority of the legislature in cases which are beyond the reach of the courts or the ordinary course of law. In other words, whenever an estate has become so tangled by deeds and limi-

tations and uses and trusts, that a court cannot by its decision untangle it, as for instance when a court declares that it cannot decree a sale of the interests by reason of outstanding titles, resort has been had to the legislature; and these acts have been held valid.

The case of Croxall *v.* Sheperd, 5 Wall., 583, was a case of this kind. In that case the court said private acts of Parliament are one of the modes of acquiring title enumerated by Blackstone, which are resorted to when the power of the court has become inadequate to give the proper relief, and the exigencies of the case require the interposition of the broader power of the legislature. They were very numerous immediately after the restoration of Charles II.

The validity of statutes affecting private interests in property has been repeatedly recognized by the Supreme Court of the United States. The case of Stanley *v.* Colt, in the same volume, 5 Wallace, at page 119, held that an act of the legislature of the State of Connecticut, decreeing the sale of property where the court could not decree the sale was valid. It can hardly be said that these cases are not in point for they show the power of the legislature to deal with private rights where a court in its decisions would have to hold that it could not deal with those rights.

The case of Calder, et ux., *v.* Bull, et ux., 3 Dal. 385, is a case more directly in point. In that case the legislature of Connecticut, on the second Thursday of May, 1795, passed a resolution or law, which, for the reasons assigned, set aside a *decree* of the Court of Probate for Hartford, on the twenty-first of March, 1793, which decree disapproved of the will of Normand Morrison (the grandson) made the twenty-first of August, 1779, and refused to record the said will and granted a new hearing by the said Court of Probate, with, liberty to appeal therefrom, in six months. A new hearing was had, in virtue of this resolution, or law, before the said Court of Probate, who, on the twenty-seventh of July, 1795, approved the said will, and ordered it to be recorded. At August, 1795, appeal was then had to the superior court at Hartford, who at February term, 1796, affirmed the decree of the Court of Probate. Appeal was had to the Supreme Court of Errors of Connecticut who, in June, 1796, adjudged, that there were no errors. More than

18 months elapsed from the decree of the Court of Probate (on the first of March, 1793), and thereby Caleb Bull and wife were barred of all right of appeal, by a statute of Connecticut. There was no law of that state whereby a new hearing, or trial, before the said Court of Probate might be obtained. Calder and wife claim the premises in question, in right of his wife, as heiress of N. Morrison, physician; Bull and wife claim under the will of N. Morrison, the grandson.

This act was upheld as a valid exercise of legislative authority, although it set aside the decree of a court of competent jurisdiction that had been passed more than two years prior to the passage of the act. The decree settled rights under a will, and these rights would have remained so settled if the legislature had not stepped in and recalled the decision, and ordered a rehearing. At the rehearing the decision was contrary to the decision recalled by the legislature, and the title to the property was vested in some other person.

The celebrated case of Pennsylvania *v.* The Wheeling and Belmont Bridge Co. (18 How. 421), is illustrative of this point. In this case the original jurisdiction of the Supreme Court of the United States was invoked by the State of Pennsylvania to enjoin the continuance of a bridge over the Ohio River at Wheeling, Virginia (now West Virginia). The bill set out that the bridge impaired the free navigation of the Ohio River, which was a tributary of the Mississippi River, and interferred with the commerce of the citizens of the State of Pennsylvania, and that it was a common nuisance to the citizens of Pennsylvania, as well as to the citizens of the United States, and that the injury to them, the citizens of the State of Pennsylvania, was irreparable. A temporary injunction was issued, testimony was taken in the case, and it came on for the final hearing in the Supreme Court of the United States—the case on its final hearing being reported in 13 Howard, 519. The Supreme Court of the United States held the bill in equity the proper remedy to remove the obstruction, decreed a removal of the bridge or a reconstruction of it so as to relieve navigation from the obstruction. The final decree, entered in May, 1852, read as follows:

"It is therefore decreed and adjudged that the said suspension bridge is an obstruction and nuisance, and that complainant

has a just and legal right to have the navigation of the said river made free, either by the abatement of or the elevation of the bridge so that it will cease to be an obstruction * * * and that the same shall be removed by respondents or altered as above, on or before the first day of February, 1853."

Since the rendition of this decree, and on the 31st of August, 1852, an Act of Congress has been passed as follows:

"That the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present positions and elevations, and shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding."

The bridge, not being removed, was, after the passage of this Act, destroyed by a flood, and thereupon the company commenced to rebuild it according to its original plan. A new bill was filed and a motion made before the Supreme Court of the United States, founded upon this bill, which was filed to carry into execution the decree of the Court rendered against the defendants at the adjourned term in May, 1852. The object of the motion on the bill was to punish the defendants for contempt for not carrying into effect the decree of the Supreme Court of the United States. The defendant responded by setting up the Act of Congress as to any further action of the Supreme Court in the matter. The Supreme Court held that the Act of Congress superseded the effect and operation of the decree previously rendered, although the decree had as matter of law declared the bridge to be an obstruction to navigation, and directed its removal.

Drawing a distinction between a judgment founded on the unlawful interference with the enjoyment of a public right and the judgment of a court upon the private rights of the parties, the Court held that Congress had full power to declare that which the Court had found to be a public nuisance, to be a lawful structure, and that the Act of Congress was conclusive on the question. The result of the decision of the Supreme Court of the United States was that its former decision was destroyed, annulled and recalled by the Act of Congress.

It will thus be seen from these precedents that in a number of

cases the legislative branch of government has destroyed and recalled the effect of particular judgments and decrees, and it has been said, the legislature having the power to do this, why should anyone suggest that the recall of decisions be further extended and that there be vested somewhere other than in the legislature, in the people themselves, the right of recall. From a legal standpoint this question is answered by a reference to the case of Chisholm *v.* State of Georgia, 2 Dal. 419, and Hollingsworth *v.* Georgia, 3 Dal. 378. In the first case, Chisholm *v.* State of Georgia, supra, the Supreme Court of the United States held that under the Constitution of the United States as adopted, a State could be sued by a citizen of another State, and that the Supreme Court of the United States had original jurisdiction over such suit, and could order process to issue against a State, and in case of its refusal to appear, could give judgment by default. This decision was not rendered by the Supreme Court of the United States until after mature deliberation. The Court referred to the case as "this great cause." Immediately upon the rendition of this decision, the States, seeing its wide effect, entered violent protest against the decision, but Congress could give no remedy, as this right on the part of the citizen of another State to sue a State was a right given by the Constitution itself.

Section 2 of Article 3 of the Federal Constitution provides:

"The judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of Admiralty and Maritime jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—*between a State and Citizens of another State;*—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

In the second paragraph of this section it is provided that in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme

Court shall have original jurisdiction; so that under the Federal Constitution, the Supreme Court of the United States had exclusive original jurisdiction over the suit in question, and the legislative department could not by an Act of Congress destroy this exclusive original jurisdiction. A resort could not be had to the legislature to recall or destroy the effect of this decision, but a resort was had to the sovereign body, which had sole authority to amend or annul a provision of the Constitution of the United States. The result was the amendment of the Federal Constitution as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state."

This amendment after passing Congress was ratified by three-fourths of the States on the eighth day of January, 1798, and it destroyed, annulled, and set aside the decision of the Supreme Court of the United States in the Chisholm case, so that the Supreme Court had no authority to proceed in that or any other case which was on its dockets, where a State was a party. After this amendment was adopted, in the case of Hollingsworth et al. *v.* Virginia, supra, an attempt was made to have the Supreme Court retain jurisdiction over cases already before it. The Court, however, unanimously declared that the amendment, being adopted, there could not be exercised by it any jurisdiction in cases either of past or future, in which a State was sued by the citizens of another State or by citizens or subjects of any foreign state; so that this amendment destroyed every case which was on or ever had been on the docket of the Supreme Court of the United States, wherein a State was a party. And although there might have been a judgment against the State, after this amendment there was no way in which such judgment could be enforced. Thus the power that had a right to amend the Federal Constitution, amended it by destroying the jurisdiction of the Supreme Court of the United States in cases where a State was a party, and by this amendment every case, whether decided or not, on the dockets of the Supreme Court of the United States was recalled. I said that this case answered legally the proposition that if the legislature could by its own enactments destroy

the effect of a court's decision, it was useless to have some other procedure by which to recall or destroy the effect of such decision. Where the court holds by its decision that an act of the legislature is unconstitutional, null and void, if a legislature would attempt to abrogate such a decision, such an attempt would be held by the court unconstitutional, null and void. Thus may decisions of courts be divided into two classes: First, the decisions which can be destroyed, avoided, and recalled by a State legislature; and, second, decisions over which the legislature has no control. The legislature has, acting within its constitutional powers, a right to destroy the effect of any decision of a court where that decision affects or may affect the future rights of the citizens of a State. Of course, it cannot destroy a judgment between private parties, because that is a contract, and no State can pass any law impairing the obligation of a contract, but it can as to all future cases nullify the judgment, and as to cases already decided it can give to the parties a rehearing and a right to recontest their rights in court, and in neither instance does it impair the obligation of a contract.

But there are a large number of cases over which the legislature has no control, and these come under the second class of cases above mentioned. Illustrative of this is the decision in the Chisholm case just referred to, where the Congress of the United States by its enactments could not deprive the Supreme Court of the United States of its original jurisdiction, and it was therefore necessary to have some other authority act in order to destroy and recall the decision, and this authority was the States themselves. So when a State court interpreting an act passed under the police power of a State holds that act to be unconstitutional the legislature of the State can afford no relief, its sovereign power being restricted by the written constitution; and, therefore, if you want to nullify, destroy, or recall a decision of this character you have to resort to the sovereign power or that part of the sovereignty which has the power to amend or nullify the State Constitution. And as in all of the States, the right to amend the Constitution is vested in the people, if you want to get rid of a decision of this character resort must be had to the people, not the legislature.

Take for instance the case where "Employer's Compensatory Acts" have been held to be null and void as unconstitutional; take the case where acts in relation to employment of laborers have been held to be unconstitutional; take the case where an employer's liability act has been held to be unconstitutional; in all of these cases, no matter what hardships are inflicted by the decision of the court, no application to the legislature will ordinarily give a remedy, and no application to a legislature can give a remedy coequal with the right given by the act held to be unconstitutional, because if another act were passed creating the same liability of the employer, such act would be held by the court to be unconstitutional. Therefore, the only power that can annul the decision of the court, is the people, and the people being the sovereign, should have the right to recall this decision and to say that they desire the act held to be constitutional which was by the courts declared unconstitutional, and thus be the law of the land, notwithstanding the particular decision of the court. This is the people doing nothing more than the legislature has done when acting within the scope of its authority; this is the people doing nothing more than they have done again and again in amending their constitution.

Every government, no matter what its character of government may be, whether it be monarchy, aristocracy, or a democracy, is theoretically supposed to be for the benefit of the people, constitutions are supposed to be adopted for the benefit of the people, and in our government the source of all authority is the people. The very theory of our government is that the sovereignty is in the people, and that the written constitutions which have been adopted are not limitations upon the right of the people, but are limitations upon the agencies of the people in carrying on for the people governments that have been established by such written constitutions. Therefore, why should a constitution destroy a right that the people desire to exist? Why should a constitution say—if the people desire that it should not say—that an employer should not under certain circumstances compensate his employee? Why should a constitution say—if the people desire that it should not say—that a laborer shall work so many hours a day?

Have not the people a right to amend their constitution in such

a way that it will not be necessary to have further litigation over such amendment? In other words, no one questions the right of the people of a State, where a court of that State has held an act of the legislature to be unconstitutional, to amend their constitution so that the legislature may after the amendment pass exactly the same act that the court has held unconstitutional. However, when this is done, the parties litigant have the right to litigate the question whether or not this act comes within the particular amendment, and in this way there are long delays, a great expense to litigants who may be poor, and nothing gained over the direct recall except the right often given for the benefit of some special interest, again to litigate the matters of the right of the recovery through the courts.

The people will have their way; they are going to rule this country and see that laws passed are for their common welfare. The people are sovereign, and they are going to exercise their sovereignty. The people of this country have established the Constitution of the United States, and the people of every one of the several States have established their own State constitutions; but the people know that they are the sovereign, and that every agency employed by them properly to manage and govern the United States or a particular State is merely a trust to carry out that which is for their benefit. If these agents do not perform their duty, the people see to it that they are not returned to office; if a constitution becomes such, either by time or through the interpretation of a court, that it is no longer capable of being instrumental in the better government of the people or in their welfare, the people will see to it that it is amended. And instead of amendments which merely create new litigation, raise new questions of constitutional law, is it not common sense, is it not reasonable, to have amendments that go direct to the heart of the matter, and amendments that will destroy and recall the decisions of courts without having to await for a further decision of a court? Is there anything revolutionary in this? Is it not a plain, reasonable proposition? Why should people be going from court to legislature and legislature to court, when they can by direct enactment have the matter settled immediately?

This is what I understand is the recall of judicial decisions; this is what I understand has been styled a new and revolution-

ary proceeding. Surely when one knows of the protracted litigation over constitutional questions which is conducted today in the courts of a great many States, surely when one knows that it often depends upon the place where a person is employed or injured, whether or not in the one instance he is to have a right of action, or in the other, to have the right of action, under an exactly similar law, denied him by a decision of a court, there can be but one conclusion, and that is, that when an act passed under the police power of a State is held by the courts to be unconstitutional under the State constitution, the people, the sovereign people who have the right to amend their constitution, should have an opportunity to vote on the question whether they desire the act to become a law, notwithstanding such decision and adjudication. They should have this right—it is hardly open to question; and the recall of judicial decisions, instead of revolutionary, is sane, reasonable and just.

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in Georgetown Law Journal.